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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/775,431	02/01/2001	Paul Gardiner	11411/110	7031

26646 7590 05/03/2002

KENYON & KENYON
ONE BROADWAY
NEW YORK, NY 10004

EXAMINER
BAHAR, MOJDEH

ART UNIT	PAPER NUMBER
1617	

DATE MAILED: 05/03/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/775,431	GARDINER ET AL.	
	Examiner	Art Unit	
	Mojdeh Bahar	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 February 2002* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-43* is/are pending in the application.

4a) Of the above claim(s) *16-43* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-15* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) *7* .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Applicant's response to the first office action of July 5, 2001, submitted February 7, 2002 (Paper No. 6) is acknowledged.

Applicant's remarks submitted February 7, 2002 in Paper No. 6 are persuasive to remove the rejection under 35 U.S.C. sections 102 over claims 8-10 in the previous office action.

Applicant's confirmation of his election of Group I in Paper No. 6 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

This application contains claim 16-43 drawn to an invention non-elected without traverse in Paper No. 6. A complete reply to the final rejection must include cancelation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.

Claims 1-15 are herein examined on the merits.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-7 and 11-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Paul et al. (US 5,292,538), of record in the previous office action.

Paul et al. (US 5,292,538) discloses a nutritional composition comprising glucose polymers, lactalbumin (whey protein), amino acid ligands (e.g. zinc arginate), potassium,

phosphorus, alpha-ketoglutarate (within the claimed range), lipoic acid (within the claimed range), vitamin C and Inositol, see claims and table columns 10-12, see also col. 4 lines 53-66.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Paul et al. (US 5,292,538) in view of Riley (USPN 5,976,568), reference submitted in the IDS of 02/21/02.

Paul et al. (US 5,292,538) discloses a nutritional composition comprising glucose polymers, lactalbumin (whey protein), amino acid ligands (e.g. zinc arginate), potassium, phosphorus, alpha-ketoglutarate (within the claimed range), lipoic acid, vitamin C and Inositol, see claims and table columns 10-12, see also col. 4 lines 53-66.

Paul et al. does not teach the exact amount of lipoic acid claimed herein.

Riley (USPN 5,976,568) teaches a nutritional supplement comprising from about 0.0 mg to about 750 mg of alpha lipoic acid, see claim 1, col. 29.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ from about 0.0 mg to about 750 mg of alpha lipoic acid in the nutritional supplement of Paul et al.

One of ordinary skill in the art would have been motivated to employ from about 0.0 mg to about 750 mg of alpha lipoic acid in the nutritional supplement of Paul et al. because optimization of amounts is within the purview of the Skilled Artisan. Furthermore as taught by Riley, from about 0.0 mg to about 750 mg of alpha lipoic acid is known to be used in nutritional supplement compositions.

Response to Arguments

Applicant's arguments filed February 7, 2002 have been fully considered but they are not persuasive. Applicant first argues that Paul et al.'s composition has a different intended use than that of the claimed invention herein. Note that the recitation of intended use does not further limit a claim drawn to a composition.

Applicant then argues that the composition taught in Paul et al. must contain Magnesium. Note that applicant's claims all employ the open transitional expression "comprising", which does not exclude the presence of other ingredients/actives in the composition. Therefore, a composition comprising the actives recited in the claims herein as well as other actives reads on the instant claims.

Applicant finally argues that "there is no showing that a composition that contains magnesium (like that of Paul's formulation) is operable in increasing lean muscle." Note that Paul's formulation comprises all the actives recited in the instant claims as well as magnesium.

Applicant's submission of an information disclosure statement under 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p) on February 21, 2002 prompted the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 609(B)(2)(i). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 from 8:30 a.m. to 6:30 p.m. Monday, Tuesday, Thursday and Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie, J.D., can be reached on (703) 308-4612. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar
Patent Examiner
April 26, 2002